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No. 81-151

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOE L. FINE AND WALTER F. JOHNSEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the Double Jeopardy Clause bars their retrial on the remaining counts of an indictment. A mistrial with respect to those counts was declared at petitioners' request after judgments of acquittal were entered on the other counts.

1. Petitioners, five other individuals, and the Drummond Coal Company were named in a 19-count indictment filed in the United States District Court for the Northern District of Alabama. The charges centered on illegal practices in the Alabama coal mining industry. Count 1, the only count in which all defendants were named, charged a conspiracy to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). The pattern of racketeering activity was alleged to consist of multiple acts of mail fraud (18 U.S.C. 1341), bribery (Ala. Code §§ 13-5-31, 13-5-32 (1975), wire fraud

(18 U.S.C. 1343), and extortion (18 U.S.C. 1951(a)). In the remaining counts, various defendants were charged with substantive crimes committed in furtherance of the conspiracy (Pet. App. A-1 to A-2).

Petitioner Johnsey, a member of the Drummond board of directors, was charged with conspiracy (count 1), one count of wire fraud (count 13), and five counts of mail fraud (counts 15-19). Petitioner Fine, an Alabama state senator, was charged with conspiracy (count 1), extortion (count 14), and five counts of mail fraud (counts 15-19) (Pet. App. A-1 to A-2).

Before trial, the defendants attacked the sufficiency of the conspiracy count and moved to sever that count from the rest of the indictment (Pet. App. A-2). The district court denied those motions (*id.* at A-2, A-12).

At trial, the government began by presenting evidence on the first 13 counts (Pet. App. A-2 to A-3). After hearing much of the government's proof on those counts and after receiving a proffer outlining the remaining evidence relevant to those charges, the court entered judgments of acquittal on counts 1 through 13 (*id.* at A-3). At petitioners' request, the court also declared a mistrial on counts 14 through 19, the counts on which no evidence has as yet been offered (*ibid.*).

Prior to retrial, petitioners moved for dismissal of counts 14 through 19 on double jeopardy grounds, claiming that the mistrial had been caused by intentional misconduct on the part of the prosecution (Pet. App. A-3). Petitioners asserted that the government had knowingly prosecuted a groundless conspiracy charge in order to improve the chances of conviction on the remaing counts (*ibid.*; Memorandum in Support of Motion to Dismiss Counts 14-19, at 3). The district court denied petitioners' motions, however,

finding neither intentional misconduct nor that the prosecution had been "grossly negligent" in seeking the indictment or in bringing it to trial (Nov. 25, 1980 Tr. 29).

On appeal prior to retrial, petitioners raised the same double jeopardy argument, but it was again rejected. The court of appeals found no support in the record for petitioners' allegation that the government had prosecuted the conspiracy charges in bad faith (Pet. App. A-8 n.13). The court added (*id.* at A-8 to A-9) that even though the prosecution's case might have been based upon an erroneous interpretation of the applicable law, "a prosecutor's misinterpretation of a court opinion, without more * * * does not descend to the level of intentional misconduct, gross negligence, or prosecutorial overreaching sufficient to warrant dismissal of an indictment."

The court also considered (Pet. App. A-7) several additional allegations of prosecutorial misconduct made by petitioners in an effort to buttress their double jeopardy claim. The court stated that it had reviewed each allegation with care but had found no "intentional misconduct, gross negligence, or prosecutorial overreaching" (*ibid.*). The court therefore affirmed the denial of petitioners' motions to dismiss the indictment. Petitions for rehearing with suggestions for rehearing en banc were denied, with no judge voting in petitioner's favor (Pet. App. A-10 to A-11).

2. The court of appeals correctly held that the Double Jeopardy Clause does not bar the retrial of petitioners on the remaining counts of the indictment. "[R]eprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the government did not deliberately seek to provoke the mistrial." *United States* v. *DiFrancesco*, 449 U.S. 117, 130 (1980). See also *United States* v. *Dinitz*, 424 U.S. 600, 606-611 (1976). In the court of appeals, petitioners conceded "the inability of the record to establish

that the prosecutor employed the RICO count for the purpose of provoking a mistrial" (Pet. App. A-8), and their petition does not contend that the government acted with that end in view. Thus, their double jeopardy argument necessarily fails.

Citing *United States* v. *Kessler*, 530 F. 2d 1246, 1255-1256 (5th Cir. 1976), petitioners maintain (Pet. 12-14) that the Double Jeopardy Clause bars retrial if a successful defense mistrial motion is provoked by the prosecution's "gross negligence" or "intentional misconduct." But even under that test, it is clear that petitioners' retrial is not precluded. Both the trial court, which was in the best position to assess the prosecutor's conduct and motives,[1] and

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[1]Petitioners assert that the court of appeals employed the "clearly erroneous" standard of review in considering their double jeopardy claims and that the court's decision conflicts in this respect with a decision handed down a few months earlier by another panel of the same court (*Baker* v. *Metcalfe*, 633 F. 2d 1198 (5th Cir. 1981)). However, any conflict among the decisions of a single circuit is properly a matter for that circuit to resolve, and petitioners brought their asserted conflict to the attention of the court of appeals both in their rehearing petition and in their suggestion for en banc review. Moreover, it is apparent that no conflict exists. As we understand the opinion below, the statements concerning the "clearly erroneous" standard of review were meant to apply only to the district court's factual findings relevant to the double jeopardy issue (see Pet. App. A-5). Those findings concerned the government's motives and intent in prosecuting the conspiracy charge. In order to make those findings, it was necessary to understand and assess much of what had occurred during the six months of pretrial proceedings and two months of trial. Therefore, it was wholly appropriate for the court of appeals to accord significant deference to the trial court's factual determinations (see Pet. App. A-5). Nevertheless, the court of appeals reviewed each of petitioners' allegations with care and made an independent determination as to whether any prosecutorial errors amounted to "gross negligence" or "intentional misconduct" (Pet. App. A-7). The approach of the panel below does not conflict with *Baker* v. *Metcalfe*, *supra*. There, the issue was whether facts not in dispute showed prosecutorial misconduct or bad faith, and the court stated: "Since violation of the double jeopardy clause is a question of law * * *, we are not bound by the clearly erroneous

the court of appeals, which carefully reviewed the record, concluded that there had been no "intentional misconduct" or "gross negligence" sufficient to prevent retrial. Further review of this largely factual question is therefore unwarranted.

Before this Court, petitioners frame the issue posed by this case as follows: "[W]hether the prosecutor is entitled to take actions which are designed to improve the chances of conviction, when the prosecutor knows that a mistrial necessarily will result from such actions *if a conviction is not ultimately obtained*, thereby acquiring through design a second chance at conviction" (Pet. 13 (emphasis added); see also Pet. 2). By framing the issue in this way, petitioners have tacitly retreated from their previous claim that the government prosecuted the conspiracy charges even though it knew they could not be sustained. Obviously, if the government hoped to obtain a conviction—and presumably to defend it on appeal—it must have had a good faith belief in the viability of its legal theory and the sufficiency of its proof. Petitioners apparently maintain, however, that retrial should be barred simply because the joinder of offenses was dependent upon the conspiracy count and because the government's good faith belief in the soundness of its case on that count proved to be unfounded. They assert, in other words, that mere prosecutorial error should bar retrial after a successful defense motion for a mistrial. Petitioners' argument is contrary to this Court's decisions, which make it clear that prosecutorial error does not suffice to bar retrial under these circumstances. *E.g., United States* v. *Dinitz, supra*, 424 U.S. at 608; *United States* v.

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standard." 633 F. 2d at 1201. Thus, the *Baker* court did not refuse to extend deference to the trial court's findings on factual questions relevant to the double jeopardy claim, and the panel below did not bow to the district court's decision on any matters of law.

Jorn, 400 U.S. 470, 484 (1971). Accordingly, further review by this Court is unwarranted.[2]

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[2]There is no need for this Court to hold the present case pending the decision in *Oregon* v. *Kennedy*, cert. granted, No. 80-1991 (Oct. 13, 1981), where the Oregon Court of Appeals held that the Double Jeopardy Clause barred retrial after a mistrial was declared at the defendant's request. The mistrial was declared in that case because the prosecutor asked an improper question that the court regarded as "intentional, at least in the sense that it appears it was made deliberately and after some thought" and "was certain to interfere with the trial process." *State* v. *Kennedy*, 49 Or. App. 415, 619 P.2d 948, 950 (1980). In the present case, by contrast, both the district court and the court of appeals found no intentional misconduct or even gross negligence on the part of the prosecution (Pet. App. A-7 to A-9; Nov. 25, 1980 Tr. 29). Thus, an affirmance by this Court in *Oregon* v. *Kennedy*, *supra*, would not necessarily bar retrial here.

Moreover, the double jeopardy standard applied by the Fifth Circuit—barring retrial if a successful defense mistrial motion is provoked by the prosecution's "gross negligence" (Pet. App. A-7; *United States* v. *Kessler*, 530 F. 2d 1246, 1256 (5th Cir. 1976))—is the most favorable to defendants of any employed in the federal system. Compare *United States* v. *Leppo*, 641 F. 2d 149, 152 (3d Cir. 1981) (requiring prosecutorial misconduct intended to provoke a defense mistrial request); *United States* v. *Roberts*, 640 F. 2d 225, 228 (9th Cir. 1981) (same); *United States* v. *Rios*, 637 F. 2d 728, 729-730 (10th Cir. 1980) (same); *United States* v. *Green*, 636 F. 2d 925 (4th Cir. 1980), cert. denied, No. 80-6039 (Apr. 20, 1981) (same); *Mitchell* v. *Smith*, 633 F. 2d 1009, 1013 (2d Cir. 1980), cert. denied, 449 U.S. 1088 (1981) (requiring intentional provocation of mistrial by prosecution or prosecutorial overreaching "so intentional, so unfair, and so prejudicial" that barring retrial is warranted). Therefore, unless this Court were to interpret the double jeopardy bar more broadly than any of the circuits has to date, retrial would not be precluded in the present case. And in the unlikely event that the result in *Oregon* v. *Kennedy* does provide support for the double jeopardy claim of petitioners in this case, petitioners will still be able to raise that argument if they are convicted after retrial. There is, therefore, no reason to hold the present case until *Oregon* v. *Kennedy* is decided.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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